No. 8352

United States
Circuit Court of Appeals
For the Ninth Circuit

MRS. AH FOOK CHANG, alias KAM YUEN, and ROBERT CHANG, alias YUK MOON, *Appellants*,	
vs.	
UNITED STATES OF AMERICA, *Appellee.*	

Closing Brief on Behalf of Appellants

On Appeal from the United States District Court for the Territory of Hawaii.

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I.

SEARCH AND SEIZURE—FEDERAL UNDERTAKING.

Counsel is hardly fair with the court when he insists the search and seizure in this case was not a federal undertaking. The whole proceeding, from the beginning to the end, was a federal matter, participated in and actively aided by federal agents and officers. Counsel's own witness, Mr. Richardson, stated:

> *"That the reason that the major part of the questioning was done by Mr. Wells was because it*

> *was a federal case and the witness regarded it as a federal case from the beginning, because it involved a quantity of opium."* (R. pp. 103; 128)

Mr. Pearson, a federal Treasury agent, had participated in the arrest and took a very active part in the search and the events that happened thereafter (R. p. 122). A practice has grown up to permit trifling violations of the narcotic and liquor laws to be prosecuted in the local police or justice's court, but all substantial offenses are prosecuted in the federal court (R. p. 131).

As far as the Fourth and Fifth Amendments are concerned, it wouldn't make any difference; that is, whether it was a territorial or federal proceeding, because, as the Supreme Court of Hawaii said in *Territory v. Home,* 26 Haw. 331, in discussing a case where federal agents had made an improper seizure and turned it over to territorial officers for prosecution:

> "It would require but one step beyond the principles announced to justify a holding that evidence obtained through an unlawful search and seizure by federal officers may be retained by the City and County Attorney and introduced in evidence upon the trial of the defendant in the territorial court but having in mind the language of the Supreme Court in the Gould Case, above referred to, *and the fact that the territorial courts derive their right to exist from federal law, we are unwilling to take that step."*

In other words, the Fourth and Fifth Amendments are applicable to the official acts and conduct of territorial police officers.

But the case at bar was essentially a federal case from beginning to end.

> "The federal government may avail itself of evidence procured by state officers through an illegal search and seizure *providing no federal officer or agent has participated therein.*"
>
> *Milburne v. U. S.,* 77 Fed.(2d) 311.

Counsel takes the following quotation from *Byars v. U. S.,* 273 U. S. 28, 47 Sup. Ct. 248:

> "* * * the *mere* participation in a state search of one who is a federal officer does not render it a federal undertaking * * *"

Counsel, however, should have continued to quote from this case, to show that *if such officer was present in his official capacity as Mr. Pearson was, it was a federal undertaking.*

II.

ERROR IN REFUSING OFFER OF PROOF ON PROCURABILITY OF SEARCH WARRANT.

We devoted some space in our brief to the proposition that the trial court erred in denying defendants an opportunity to show that a search warrant could reasonably have been obtained and submitted that such evidence was relevant. Counsel does not deny that our conception of the law is correct, but justifies the action of the court in denying the offer of proof upon statements made by certain witnesses for the government, *in the course of the trial,* that they did not have

sufficient facts to obtain a search warrant. It was immaterial what they said on the trial. Robert Chang filed in advance of trial a motion to suppress, and in the course of proceedings on the motion, the defendant properly offered to show that the officers had facts upon which they could reasonably have obtained a search warrant (R. pp. 66-71), and we submit this offer was improperly denied.

> "* * * the search and seizure without first procuring a search warrant may well have been unreasonable in view of the abundant opportunities the officers had to obtain one."
>
> *Milburne v. U. S.,* supra.

Commenting on this same situation, the Supreme Court in *Taylor v. U. S.,* 286 U. S. 1, 52 Sup. Ct. 466, said, in referring to the neglect of officers to obtain a search warrant:

> "They had abundant opportunity to do so and to proceed in an orderly way * * *"

Their neglect made the search and seizure unreasonable.

III.

NO CONSENT TO SEARCH.

It would be pointless to prolong this brief with further discussion of the question of whether the defendant, Robert Chang, consented to the search of his room. Courts have frequently said that each case must turn upon its peculiar facts where government

agents rely upon consent as an excuse for not obtaining a search warrant. During the years of judicial history under the Eighteenth Amendment, a great many cases arose which superficially would appear to be in some discord, but only superficially, because it is now universally conceded that consent to a search, so as to amount to a waiver of the applicable constitutional right, must be freely and voluntarily given out of desire and willingness to have the search take place, and not such a consent as might be wrung from the frightened lips of a boy shoved upstairs by high-pressure officers, *demanding* "permission" to search his room (R. pp. 53; 65).

IV.

UNLAWFUL IMPRISONMENT.

Counsel has said nothing in his brief which shows any warrant whatever for the prolonged incarceration of the defendants and the infant without charge and without opportunity to make bail. We concede that officers, under certain circumstances, may arrest a person without warrant but the arrested person has a right to be charged within a reasonable time and this is so whether proceeding under provisions of federal law or local law. These defendants were held for no other purpose than to compel them to give evidence against themselves, coercion by durance.

V.

CONFESSION EVIDENCE AGAINST MAKER ONLY.

We pointed out in our opening brief that the court erred in instructing the jury that the confession of Mrs. Ah Fook Chang could be considered as evidence against Robert Chang and we showed that Robert Chang had never read over Mrs. Ah Fook Chang's confession and, apparently, did not know what it contained. Counsel would have the court hold that the court's action in this respect was not error. At the trial counsel recognized that the woman's confession was not evidence against the boy. When the request was made that the familiar instruction be given to the jury that the confession of one defendant was not evidence against the other, counsel said:

> "We have no objection to the jury being so instructed for the reason that with this particular statement (Mrs. Ah Fook Chang's) there is no evidence that Robert Chang was asked whether or not this statement was correct." (R. p. 152)

Counsel was franker in the trial of this case than he has been in his brief. When the court disregarded the prosecution's consent on limiting the confession to the party making it, the judge asked the witness on the stand, being the officer who took the confession, the following questions:

> "Q. At the time this statement was read to Mrs. Ah Fook Chang was Robert Chang present?
>
> A. Yes sir.
>
> Q. He *heard* the statement read to her?

A. We was sitting in the room to my right; Mrs. Ah Fook Chang was on the left of the table."
(R. pp. 151-153)

Note how the witness sparred away the question. He would not state that Robert Chang heard this confession. As far as he would go was to say that the defendant was on the right of him. We don't know, from the answer, whether the defendant was one foot or fifty feet on his right side, or whether he could hear or had any conception whatever of what was contained in the paper his mother signed. Of course, the court erred in denying this request, just as he erred in the latter part of the proceedings when the foreman was instructed that the confession of one defendant was a confession of all.

VI.

ERROR IN INSTRUCTING FOREMAN.

It is a rule of criminal law that defendants in a trial for a felony must be present at each and every stage of the trial (16. *C. J.* 813 and cases cited). The communication between the judge and the foreman of the jury was in the absence of the defendants. This communication must be considered as a stage in the trial and the court had no right to instruct the foreman in the absence of the defendants. Of course, the whole proceedings were irregular. It is elementary that any instruction for the jury must be given to

the jury in open court by the judge and he may not delegate the matter to a single juror.

> "All communications between the judge and the jury, after they have retired to consider their verdict, must be made in open court, accused and his counsel being present, and it is error for the judge, in the absense, or without the hearing, of defendant and counsel, to have communication with the jury while they are deliberating."
>
> 16 *C. J.* 1090.

> "Although there is authority to the contrary, as a general rule, it is error to repeat a charge to the jury or to give them additional instructions in the absence of accused, the presence of his counsel does not cure the error."
>
> 16 *C. J.* 1089.

In this case, we submit it was error for the court to instruct one member of the jury in the absence of the others; to instruct elsewhere than in open court; and to instruct in the absence of accused. And, of course, the instruction itself was thoroughly erroneous.

VII.

COURT SHOULD HAVE DEFINED "VOLUNTARY".

When a confession is admitted, in a case where its voluntary character is conceded, an instruction defining "voluntary" would be unnecessary, for the obvious reason that it was not an issue. But in this trial, defendants challenged from the beginning the

voluntary character of the confession, claimed it was obtained by duress and coercion and asked that it be excluded. Before trial, they testified at length in support of a motion to suppress and on the trial, while they themselves did not testify, the government agents were questioned by defendants' counsel, practically the entire interrogation being devoted to the question of the voluntary character of the confession. This interrogation brought out that defendants had been held in jail for a long period without bail, without normal nourishment, and had been interrogated for many hours, under circumstances at least tending to show both duress and coercion. Manifestly enough was developed to leave the jury free to conclude, if it desired, that the confessions were not, in fact, free and voluntary (*Wilson v. U. S.,* 162 U. S. 313, 16 Sup. Ct. 895 at 899). The importance to the defendants of the requested instruction defining the meaning of free and voluntary is self-evident.

It is respectfully submitted that this cause should be reversed and defendants discharged.

Respectfully submitted,

E. J. Botts,

Attorney for Appellants.

Receipt of a copy of the foregoing Closing Brief on Behalf of Appellants is hereby acknowledged, this 12th day of February, A. D. 1937.

Willson C. Moore,

Assistant U. S. District Attorney.